TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

JERRY LESTER.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1960.
CERTIORARI GRANTED NOVEMBER 14, 1960.

Supreme Court of the United States

OCTOBER TERM, 1960

No. 376

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

JERRY LESTER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEFORE THE TAX COURT OF THE UNITED STATES

[fol. A] Filed Dec. 17, 1959.

Docket No. 67540

JERRY LESTER, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES:

For Petitioner: Louis Mandel, Esq.
Leonard J. Lefkort, Esq.

For Respondent:

DOCKET ENTRIES

1957

May 28—Petition received and filed. Taxpayer notified. Fee paid.
June 10—Copy of petition served on General Counsel.
May 28—Request for Circuit hearing in N.Y., N.Y. filed by Petr. Granted 6/10/57. Served 6/11/57.
May 28—Entry of appearance of Louis Mandel as counsel filed. Served 6/10/57.
June 27—Answer filed by Resp. Served Jun 28 1957.

1959

Feb 2—Notice of trial at New York, N.Y. Apr. 20, 1959. Served 2/2/59.
Apr 23—Order that case is continued to May 18, 1959, New York, N.Y. Served May 1, 1959.
Apr 30—Notice of trial May 18, 1959, New York. Served May 1, 1959.
May 19—Trial at New York by J. Murdock. Appearance of Leonard J. Lefkort, Esq. filed. Orig. briefs due July 3, 1959. Replies due July 23, 1959.

1959

June 4—Transcript of proceedings of May 18, 19, 1959. (1).
July 3—Orig. brief filed by petr. Served 7/30/59.
July 6—Motion by resp. for extension of time to August 3, 1959 to file brief. Gr. 7/10/59. S. 7/13/59.
July 27—Orig. brief filed by resp. Served 7/30/59.
Aug 17—Reply brief filed by petr. Served 8/26/59.
Sept 9—Findings of Fact and Opinion, Judge Murdock. Decision will be entered for the Commissioner. Served 9/9/59.
Sept 11—Decision entered, Judge Murdock. Served 9/14/59.
Nov 10—Petition for review by U.S. Ct. of Ap. 2nd Cir. filed by petr.
Nov 10—Proof of service filed.

[fol. 1] BEFORE THE TAX COURT
OF THE UNITED STATES

Docket No. 67540

JERRY LESTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

EXCERPTS FROM PROCEEDINGS OF MAY 18 AND 19, 1959

Room 5050,
Grand Central Terminal Building,
70 East 45th Street,
New York, New York,

Met, pursuant to notice, at 10 o'clock a.m.

BEFORE:

HON. J. EDGAR MURDOCK, Judge.

APPEARANCES:

LOUIS MANDEL, and L. J. LEFKORT,	1501 Broadway, New York, New York, appearing for Petitioner.
JOHN A. DUNKEL, ESQ.,	90 Church Street, New York 7, New York, appearing for the Respondent.

[fols. 2-16] • • •

• • • •

[fol. 17] LOUIS MANDEL

was called as a witness on behalf of Petitioner and, after being first duly sworn, was examined and testified as follows:

• • • •

[fols. 18-24] • • •

[fol. 25] CROSS EXAMINATION

• • • • •

[fol. 26] Q Were the children residing with her during those years?

A I don't know. I know certain parts of the year [fol. 27] they were not residing with her, they were residing with their father.

• • • •

[fol. 28] • • •

[fol. 29] THE COURT: Well, this isn't like an affidavit. This is an agreement between two people and it has material bearing upon the case that is before us and those two people have signed it and they are obviously or it seems obvious that they were dealing at arm's length and that their interests were different and I wouldn't think there would be any reason to doubt the fact that they were married or that they had children when they agreed they had, and the agreement pertains to what they are going to do about the situation because the husband and wife are now separating or they have and they are going to make some payments to each other.

• • • • •

[fol. 30] THE COURT: Are there any statements that state the division of the total funds between wife and children?

MR. DUNKEL: Paragraph 11.

THE COURT: Husband agrees to pay the wife for the support and maintenance for herself and the children—and so forth, I am not reading it entirely. Upon what do you rely to break down the total between alimony and child support?

MR. DUNKEL: Page 20, Paragraph I.

THE COURT: That is, if one of the children should marry, become emancipated or die while this agreement is still in effect, then the payments herein certified shall, on the happening of each such event, be reduced in a sum equal to one-sixth of the payment which would thereafter [fol. 31] otherwise accrue and be payable in accordance with the terms and provisions here of. you claim on the basis of that, one-half of this was payable to the children, is that your point?

MR. DUNKEL: Yes, Your Honor.

MR. MANDEL: Our point, right in the same paragraph that you had, which is the sense of the whole agreement, is that all payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, it all ceases. All the cases hold—

THE COURT: I am familiar. Your point is since the whole thing was to rest on something happening to the wife—

MR. MANDEL: Or "remarriage."

THE COURT: Well, that would be something happening. She could die or remarry, I was trying to cover them both with one word; since the whole thing is to stop under those circumstances, it is an indication that so long as the thing continued as it started, there was no means of dividing between wife and children the total amount to be paid.

MR. MANDEL: My argument is still further if you are going to use the rules of law to divide which they used to use: What was left after the wife remarried. They generally went along with the old cases, calling for the support of the children. Using that equation, what was left if this wife remarried—nothing. Therefore nothing [fol. 32] was for the support of the children.

THE COURT: You read the whole thing together and you find out if there was any justification for a separation during the taxable years of the total sum in alimony and child support.

MR. MANDEL: Right.

THE COURT: You look at it and you say for the reasons you outlined, you can't divide it. He says if one of the children should die or the wife should remarry, he is relying upon that to support his argument that one-half is really not alimony at all but is for the support of children.

MR. MANDEL: That is correct. I don't mean to interrupt. It is just my nervous system.

THE COURT: It is a little odd in the whole thing as to why—suppose his wife had died a day or so afterwards, then I suppose his theory was that he would take care of the children?

MR. MANDEL: Right. I have one other point, the whole agreement—as I say, I am talking from my side and the people who drew it. I will point to another paragraph which indicates this was the intention—further on, as we go on with the agreement it provides in one of the paragraphs, and my associate will get it, that she is to receive so much money, so she is left with 15,600 a year after the payment of taxes. Now $15,600 a year after the payment of taxes is in another paragraph in later [fol. 33] years. If he were to pay taxes on that money, that paragraph wouldn't read that way.

THE COURT: Well, I can understand that. It is what they intended all right. But we still would have the problem as to what the Internal Revenue Code provides.

MR. MANDEL: It is 11(d), Your Honor, if you care to look at it.

• • • • •

(Whereupon, at 10:35 o'clock a.m., the hearing in the above-entitled matter was closed.)

[fols. 34-48] • • •

[fol. 49] PETITIONER'S EXHIBIT NO. 1

EXCERPTS FROM PROPERTY SETTLEMENT AGREEMENT

BETWEEN

ARDELL LESTER, WIFE

and

JERRY LESTER, HUSBAND

Dated: April 16th, 1951

[fols. 50-55] • • •

• • • • •

[fol. 56] 8. The wife does hereby assign, transfer and convey to the hsband all of her right, title and interest in and to the following property, and it is hereby agreed that henceforth all of the following property shall be the sole and separate property of the husband:

• • • • •

[fol. 57] (e) Life insurance policies identified as follows, and all having been issued by the New York Life Insurance Company:

Policy #17871908 in the sum of $25,000
Policy #18014196 in the sum of $25,000
[fol. 58] Policy #18014197 in the sum of $25,000

The foregoing policies are subject, however, to the following terms and conditions:

i) So long as the husband is required to pay the wife the sums and amounts set forth in Article 11 hereof, but in no event later than January 1, 1954, he will cause the wife to be named and designated as the sole and irrevocable beneficiary to the extent of $20,000 of the proceeds which might be payable pursuant to said policies, or any of them.

ii) So long as the husband is required pursuant to the terms and provisions of this agreement or by

law, to maintain and support all of the children of the parties, he will cause all of the children to be jointly named as the sole and irrevocable beneficiaries to the extent of $30,000 of the proceeds which might be payable pursuant to said policies, or any of them. In the event that the said obligation of the husband shall cease or terminate as to any of said children, said child may be withdrawn as such designated beneficiary, although the obligation herein set forth shall continue with respect to the other children.

[fols. 59-71] * * *

[fol. 72] 16. This agreement is entered into in the State of California, and shall be construed and interpreted under and in accordance with the laws of the State of California.

[fols. 73-154] * * *

[fol. 155] 32 T. C. No. 108

BEFORE THE TAX COURT OF THE UNITED STATES

JERRY LESTER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 67540. Filed September 9, 1959.

85

ALIMONY - DEDUCTION ; CHILD SUPPORT - SECTIONS 23(u) AND 22(k). - Periodic payments made by a divorced husband to his wife not only for her support and maintenance but specifically to include support and maintenance of their three minor children, held not deductible by the husband to the extent that the agreement and decree indicated that they were for the support and maintenance of the minor children.

FINDINGS OF FACT AND OPINION—SEPT. 9, 1959

Louis Mandel, Esq., and *Leonard J. Lefkort, Esq.*, for the petitioner.

John A. Dunkel, Esq., for the respondent.

The Commissioner determined deficiencies in income tax of $7,572.39 for 1951 and $13,761.72 for 1952. The sole issue is whether the Commissioner was correct in determining that a part of payments made by the petitioner to his former wife were for the support of their [fol. 156] children and not deductible under Section 23 (u) of the Internal Revenue Code of 1939.

FINDINGS OF FACT

The petitioner, herein called Jerry, filed his income tax returns for 1951 and 1952 with the district director, Upper Manhattan, New York.

Jerry and his wife, Ardell, entered into a "Property Settlement Agreement" on April 16, 1951. The agree-

ment recited that they were married on August 24, 1934, in Los Angeles, California; they had three children, Judy age 13, Joan age 11 and Jay age 9; and Jerry and Ardell were separated and living apart.

Paragraph (d) of the agreement was as follows:

> (d) The parties desire by this agreement to settle for all times their respective property rights, interests, duties and obligations with respect to each other, and to arrange by agreement for the making of periodic payments to the wife as and for the maintenance and support for her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship between the parties, whether or not a divorce or decree of separation may hereafter be granted in favor of either of the parties hereto against the other.

The agreement recited that a suit for separate maintenance by Ardell was pending against Jerry in the Superior Court of the State of California.

It was agreed "that the welfare and best interests of the minor children of the parties hereto are of paramount concern and interest to the parties," both the husband and wife were fit and proper persons to "have the care, custody and control of the children" but such care, custody and control would be given to the wife, subject to the petitioner's reasonable right of visitation and the right to have the children stay with him for 30 days during the summer vacation.

Paragraph 11 of the agreement is, in part, as follows:

[fol. 157] 11. The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):

> (a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income

commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.

(b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

(d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of the hsuband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.

• • • •

(f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated.

• • • •

(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would

thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

* * * *

[fol. 158] A California court on April 27, 1951, entered an interlocutory judgment of divorce between Jerry and Ardell, which ratified, confirmed and approved the agreement of April 16, 1951, and set forth the substance of the provisions of the above-quoted paragraph 11. It ordered the petitioner to commence making the payments provided in the agreement one day after the entry of the decree. It also provided that the petitioner and Ardell were to remain husband and wife until the entry of the final judgment of divorce one year after the entry of the interlocutory judgment. A final judgment of divorce was entered November 5, 1952, in the action in the California court. The petitioner made periodic payments totaling $23,000 in 1951 and $39,000 in 1952, pursuant to the agreement of April 16, 1951. Ardell resided in California during 1951 and 1952.

Jerry deducted the full amounts of the payments for each year. The Commissioner in determining the deficiency for each year disallowed one-half of each deduction and explained:

> It is held that $11,500.00 of the $23,000.00 claimed as alimony payments for the taxable year 1951 and $19,750.00 of the $39,500.00 claimed as alimony payments for the taxable year 1952 do not constitute deductions allowable under the provisions of Section 23(u) of the 1939 Internal Revenue Code and the corresponding sections of the regulations.

Opinion.

Murdock, *Judge:* The issue for decision is whether Jerry is entitled to a deduction under section 23(u) but the answer must be sought in section 22(k) of the Internal Revenue Code of 1939. Section 23(u), as applicable to the taxable years 1951 and 1952, provides that a husband may deduct amounts which are includible in the income of his wife under section 22(k) if paid within his taxable

year. Section 22(k), as applicable to the taxable years, [fol. 159] provides in so far as material hereto, that a wife who is divorced from her husband under a decree of divorce shall include in her gross income periodic payments received subsequent to such decree in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce. It further provides that the subsection shall not apply "to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

The intention of Congress in enacting these provisions was to allow the husband to deduct alimony payments and to require the wife to report alimony payments as income. Congress did not intend to allow the husband deductions for amounts supplied by him to be expended in support of his minor children. Section 24(a)(1) expressly provides that no deduction shall be allowed in any case in respect of "Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x)." The obligation to support his minor children is imposed upon the husband by law and cannot be escaped by him through any agreement with his wife, whether incident to divorce or otherwise. However, Congress provided that the part of any periodic payment made by a husband to the wife which would not be taxable to the wife would only be such "part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." If it is clear from [fol. 160] the terms of the decree or written instrument that some part of the total payments to the wife is intended to be used for the support of the children, then it seems only proper to examine the instrument as a whole in an effort to determine whether it can be fairly said that an amount of money or a portion of the payment is fixed therein as a sum which is payable for the support of the minor children.

Payments made by a husband to his divorced wife, to the extent that they are to be used to discharge his obligation to support their minor children, do not represent earnings of the wife or profit of any kind to her and are not her income in any true sense. The Tax Court, with these thoughts in mind, has felt that payments, made by the husband to the mother of his children, which are obviously intended to include both alimony for the wife and support for the minor child or children should not be regarded as entirely alimony for the purpose of section 22(k), if the terms of the agreement or decree contain a reasonable indication of how the total payment is to be divided. Such an intended division may be indicated by the amount or portion of the total payment which is to be discontinued when the obligation to support a minor terminates. The Tax Court has endeavored, in prior opinions, to interpret section 22(k) in accordance with the intention of Congress not to tax as income to the wife funds supplied by the husband to be used by the wife in fulfilling his legal obligation to support their minor children. *Robert W. Budd*, 7 T.C. 413, affd. 177 F. 2d 198 (C.A. 6); *Warren Leslie, Jr.*, 10 T.C. 807; *George R. Joslyn*, 23 T.C. 126, affd. in part and reversed in part 230 F. 2d 871 (C.A. 7); *Mark B. Deitsch*, 26 T.C. 751, reversed on facts 249 F. 2d 534 (C.A. 6); *Truman W. Morsman*, 27 T.C. 520; *Russell W. Boettiger*, 31 T.C. 477; *Arthur G. B. Metcalf*, 31 T.C. 596, on appeal; *Mandel* [fol. 161] *v. Commissioner*, 185 F. 2d 50 (C.A. 7), affirming a Memorandum Opinion of this Court.

Here it is clearly indicated in the agreement of the parties and in the decree that a part of the payments from this husband to this wife were intended to be used by her for the support of their minor children. The agreement of April 16, 1951, sets forth the intention of the parties that the periodic payments to the wife are "for the maintenance and support of her and the aforesaid children of the parties, in discharge of the husband's legal obligations arising out of, or in connection with the marital and family relationship between the parties." It also states "that the welfare and best interests of the minor children of the parties hereto" are of paramount

concern and interest to the parties. Ardell did not have unrestricted use of the entire amount of the payments which she received from Jerry. They were not all available for her own use and benefit. She could be held accountable through court action for failure to use a proper portion of the funds received in each year for the adequate support of the minor children. The agreement and the decree must be examined to determine whether any sum or portion of the whole was fixed therein for the support of the minor children. The Commissioner in his determination has held that one-sixth of the payments received in each year was fixed by the agreement and the decree for the support of each minor child.

Paragraph 11 of the agreement begins with these words: "The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts * * *." Another provision [fol. 162] of that paragraph is: "In addition to the payments above provided the husband agrees to pay for extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated." The agreement does not state specifically that so many dollars or a certain portion of each periodic payment was for the support and maintenance of one or more of the three minor children. However, section 11 contains this provision: "In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof." A reasonable inference may fairly be drawn from reading this instrument as a whole that at least one-sixth of each payment was intended and fixed by the parties in the agreement to be used in the discharge of Jerry's obligation to support one of his minor children during its minority. That is in accordance with the Commissioner's determination which Jerry had the burden to disprove. He did not

testify. It is a fair and just result between the husband and wife, and the Court feels that it is the proper result under the law and facts of this case.

The Court of Appeals for the Second Circuit in the case of *Weil* v. *Commissioner*, 240 F. 2d 584, reversing the Tax Court, a case strongly relied upon by the petitioner, said:

> • • • Accordingly, if sums are to be considered "payable for the support of minor children," their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children.
>
> • • •

[fol. 163] Payments to the wife in that case were to continue without reduction, even though the necessity to support the children terminated, unless the wife remarried. It seems obvious from the opinion that the Court of Appeals placed considerable reliance on those provisions. The Court of Appeals for the Ninth Circuit in *Eisinger* v. *Commissioner*, 250 F. 2d 303, affirming a Tax Court Memorandum Opinion, said of the *Weil* case:

> We agree with it, in its application of law to the facts of that case, but do not find the legal position there taken applicable herein, nor do we agree with the generality of some of its language.

One of the distinctions made in the *Eisinger* case between that case and the *Weil* case was "that payments to the wife should not be revised, even though one or both children died, or became of age, or because either failed to longer live with their mother," whereas in the *Eisinger* case the payments to the wife were to be reduced by a specified amount as each child reached majority or died. The same distinction exists between the present case and the *Weil* case, the present case being like the *Eisinger* case rather than like the *Weil* case. Ardell lived in California during 1951 and 1952, and, if she were contesting the inclusion of these payments in her income, the Tax

Court would undoubtedly hold that one-half of the payments should not be included in her income. The Court of Appeals for the Ninth Circuit would apparently affirm. Cf. *Eisinger* v. *Commissioner, supra.* See also the opinion of the Court of Appeals for the Sixth Circuit in *Robert W. Budd, supra. Henrietta S. Seltzer,* 22 T.C. 203, is also distinguishable since there the record does not show that the payments may not continue to the wife after the obligation to support minor children terminates. The entire payments which Jerry was making to Ardell were [fol. 164] not to be continued uninterrupted in case support of the minor children became no longer necessary, but, on the contrary, were to be reduced by one-sixth for each child. Each case must be decided on its own facts and, on the facts here presented, it is not clear that the Court of Appeals for the Second Circuit, to which this case would probably go on appeal, might not decide, as we do, to sustain the determination of the Commissioner.

Decision will be entered for the Commissioner.

[fol.165] BEFORE THE TAX COURT
OF THE UNITED STATES
WASHINGTON

Docket No. 67540.

JERRY LESTER, PETITIONER,

v:

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

DECISION—Sept. 11, 1959

Pursuant to the determination of the Court, as s
forth in its Findings of Fact and Opinion, filed Septemb
9, 1959, it is

ORDERED AND DECIDED: That there are deficiencies
income tax of $7,572.39 for the year 1951, and $13,761.
for the year 1952.

/s/ J. E. MURDOCK
Judge.

Enter:
ENTERED SEP 11 1959

[fol. 166] IN THE UNITED STATES
COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 301—October Term, 1959.

(Argued May 3, 1960)

Docket No. 26020

JERRY LESTER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

OPINION—June 6, 1960

Before:

LUMBARD, *Chief Judge*,

HAND, *Circuit Judge*, and JAMESON, *District Judge*.

On petition to review a decision of the United States Tax Court assessing against the petitioner deficiencies in income taxes for the years 1951-52.

LOUIS MANDEL, *for the petitioner*.

NORMAN H. WOLFE, *for the respondent*.

HAND, *Circuit Judge*:

Lester, the taxpayer, petitions to review an order of the United States Tax Court, holding him liable for deficiencies in his income tax for the years 1951-1952, based [fol. 167] upon the disallowance of deductions claimed by

him as payments of alimony. The facts were as follows: Lester and his wife had three children, aged 13, 11 and 9. They lived in Los Angeles and had been married on August 24, 1934. On April 16, 1951, while the wife was still living in California, though he had himself moved to New York, they entered into an agreement in anticipation of a divorce. This agreement provided that the custody and control of the children should be given to the wife subject to plaintiff's reasonable right of visitation and of having the children with him for thirty days during the summer vacation. The important provision was paragraph 11, which we quote in part:

"11. The husband agrees to pay the wife for the support and maintenance of herself and the children of the parties, namely, JUDY LESTER, JOAN LESTER and JAY LESTER, the following amounts commencing with the effective date of this agreement (as said term is hereinafter defined in subdivision (j) of this Article 11):

"(a) For the period ending December 31, 1951, a sum equal to 50% of the husband's gross income commencing with the effective date of this agreement, but not in excess of a total sum of $50,000.

"(b) For the calendar year immediately following the period set forth in subdivision (a) hereof, a sum equal to 25% of the husband's annual gross income during said period of one year, but not in excess of a total sum of $45,000.

"(c) For the calendar year immediately following the period set forth in subdivision (b) hereof, a sum equal to 25% of the husband's annual gross
[fol. 168] income during said period of one year, but not in excess of the total sum of $45,000.

"(d) For each year immediately following the period set forth in subdivision (c) hereof, a sum equal to 20% of husband's annual gross income during each such year, but not in excess of that sum each year which, after the payment of all income taxes assessable upon the wife with respect to the amounts thus paid to the wife shall equal $15,600.

"(f) In addition to the payments above provided the husband agrees to pay for any extraordinary and unusual medical and dental expenses and fees incurred with respect to any of the children of the parties so long as they are minors and are not emancipated.

• • • • •

"(i) All payments herein specified shall cease upon the death of the husband or the wife or upon the remarriage of the wife, whichever shall first occur. It is expressly agreed that the wife shall not have any claim against the estate of the husband, should he predecease her, for any sums payable hereunder, except such sums as may have been due and payable to her pursuant to the terms hereof prior to his death. In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof."

By paragraph 8(e) the parties also agreed that, so long as the husband was required by the agreement or by [fol. 169] law to support the children, he would cause them to be jointly named as beneficiaries to the extent of $30,000 of the proceeds payable under three life insurance policies assigned by his wife to him.

The taxpayer performed the agreement by paying to his wife the sums specified in paragraph 11 and deducted on his income tax returns as alimony the "periodic payments" made during the years 1951-52. The Commissioner and the Tax Court held that he was entitled to deduct only one half of these as alimony, because subdivision (i) of paragraph 11 showed that one half was all that she was entitled to keep for her own use, the other half being paid for the maintenance and support of the children.

The question involved has been the subject of a number of decisions as to the proper interpretation of § 22(k) of

the Internal Revenue Code of 1939, which provides that "periodic payments * * * in discharge of a legal obligation which, because of the marital or family relationship is imposed upon * * * such husband * * * shall be includible in the gross income of such wife." The "periodic payments" prescribed by the agreement were clearly imposed upon the taxpayer because of a "marital or family relationship"; and were therefore deductible by him. However, a difficulty arises from the succeeding sentence of § 22(k), which reads as follows: "This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." The courts are not unanimous as to what is meant by the phrase, "fix in terms of an amount of money or a portion of the payment." In the case at bar the Commissioner and the Tax Court have read the language in paragraph 11(i) of the agreement as "fixing" one half of all the payments made to the wife as sums "payable for the support of minor [fol. 170] children of such husband." If they are so read, the decision of the Tax Court was of course right; if not, all the payments are to be regarded as gross income of the wife, and the deficiencies should be expunged.

In *Weil v. Commissioner*, 240 Fed. (2) 584, we held that a very similar agreement did not "fix * * * in terms * * * of a portion of the payment" what the wife was to spend for the support of the children. We held, p. 588, Judge Medina writing, "that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose and the wife must have no independent beneficial interest therein." In that case the agreement did not provide for any reduction in the "periodic payments" if the wife remained unmarried, but it did reduce them upon the death or marriage of a child if she did remarry. The same reduction was to be made also in case a child cared to live apart from the wife after the wife remarried. So far as we can see our

second decision, *Hirshon's Estate* v. *Commissioner of Internal Revenue*, 250 Fed. (2) 497, neither adds to, nor detracts from, the first. *Deitsch* v. *Commissioner*, 249 Fed. (2) 534 (C. A. 6), accords with our interpretation and distinguished a former decision of the same court (*Budd* v. *Commissioner*, 177 Fed. (2) 198) on the ground that a fixed sum had been "earmarked" as payable for a son's support.

In *Eisinger* v. *Commissioner*, 250 Fed. (2) 303 (C. A. 9) and *Metcalf* v. *Commissioner*, 271 Fed. (2) 288 (C. A. 1) the "periodic payments" were not allocated as between support of the children and alimony, but they were reduced as each child reached majority or died. Both courts found in the provisions for such reductions evidence that the "terms" of the agreements had from the outset "fixed" a portion of the "periodic payments" as being "for the [fol. 171] support" of the children. For this reason they charged the wife's gross income with only the remaining portion of the payments. It is quite true as Judge Aldrich said in *Metcalf* v. *Commissioner*, *supra*, 291, that "it is highly impractical, if not impossible, to segregate every expense from day to day so that the parent has no independent beneficial interest therein.'" However, the language of the statute seems to us not to submit itself to be recast so freely. That part of a "periodic payment" that is not to be charged to the husband's gross income is only that which the "written instrument" (shall) "fix, in terms of * * * a portion of the payment, as a sum which is payable for the support," etc. It by no means follows, because when a child dies or marries or reaches twenty-one the "periodic payments" are diminished, that from the outset that child's support has been "fixed" by the amount of the possible reduction. Indeed such a construction would defeat what is the basic meaning of such an agreement, for the mother is to be free to use her judgment in allocating the collective unit among her children and herself. It is true that it is assumed that she will use the payments to some extent to support the children, but we need not say that there could never be occasion when a court would overrule her discretion. In any case she is ordinarily free to allocate the payments as she

thinks best, from time to time, spending on herself what she may think will in the end be for the best of the group. The fact that, when the group changes, the "periodic payments" are reduced in a "fixed" proportion does not indicate that meanwhile the wife's discretionary power has been limited. Indeed, we do not see why, if the existing allocation at the time of a child's death, marriage, or majority were to determine his proportion of the earlier payments, it does not follow that the wife's discretion is taken away altogether. Unless we have misapprehended its meaning, Congress intended to tax the wife on all [fol. 172] the payments unless the agreement itself declared in what proportion she must allocate them to the children.

The Tax Court seems to have thought that it would be unfair to impose upon the wife an income tax upon that part of the payments that might be used to discharge the husband's duty to support the children. The sentence of § 22(k) that we are discussing recognizes this possibility and attempts to provide against it, but Congress apparently thought that it was impossible to do so except when the agreement "fixes" in advance some "portion of the payment, as a sum which is payable for the support of minor children." When the agreement does this the spouses have made the best forecasts they can as to what the allocation shall be. Like all other forecasts they are necessarily no more than guesses, and what seems a fair division today will often prove grossly unfair tomorrow. But there is no escape from accepting that chance except by repeated appraisals of the relative needs of the individuals making up the group; and we agree with Judge Aldrich that that "is highly impractical, if not impossible."

Moreover, it is not so gross a solecism as it might appear to make the wife's income tax depend in part upon receipts that she gives to others. If, as we have tried to show, there is no other way to meet the prime purpose o the spouses but to leave the allocation from time to time in the wife's hands, it is an unavoidable consequence that she will be taxed on whatever she gives away. We cannot find in that an injustice that demands the disregard of plain language patently chosen with care. In spite

of that burden, the control of the wife still has most of the component interests that in combination are "property." She may believe it desirable at times not to allocate to a child any "part" of a "periodic payment," because the child needs her continued supervision at home, [fol. 173] and that free spending money is the one thing to be avoided. When all is said there is little difference between a control so nearly absolute as this and full fledged "ownership." "But what are the rights of ownership? They are substantially the same as those incident to possession. Within the limits prescribed by policy the owner is allowed to exercise his power over the subject-matter uninterfered with and is more or less protected in excluding others from such interference. The owner is allowed to exclude and is accountable to no one. The possessor is allowed to exclude all but one and is accountable to no one but him." (Holmes, *The Common Law*, p. 246.).

Order reversed; tax deficiencies expunged.

[fol. 174] IN THE UNITED STATES
COURT OF APPEALS

SECOND CIRCUIT

* * * *

JERRY LESTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT—June 6, 1960

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed and that the tax deficiencies be and they hereby are expunged in accordance with the opinion of this Court.

s/ A. DANIEL FUSARO
Clerk

(File Endorsement Omitted)

[fol. 175] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 176] SUPREME COURT OF THE UNITED STATES

No. 376, October Term, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JERRY LESTER

ORDER ALLOWING CERTIORARI. November 14, 1960.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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